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***Examination of Prosecution Witnesses:  
Georgian Criminal Procedure Compared to Dutch  
Criminal Procedure and ECtHR Case-Law***

***Report commissioned by the  
Open Society Foundation Georgia***

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the Netherlands***





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## Abbreviations

appl.no.	application number (number of an application made at the ECtHR)
CCG	Criminal Code of Georgia
CCNL	Criminal Code of the Netherlands ('Wetboek van Strafrecht')
CCPG 1998	Criminal Code of Georgia, adopted on 20 February 1998 and most recently amended on 24 February 2004
CCPG 2009	Criminal Code of Georgia, adopted on 9 October 2009 and most recently amended on 31 October 2013
CCPNL	Code of Criminal Procedure of the Netherlands ('Wetboek van Strafvordering')
dec.	decision (of the European Court of Human Rights)
ECHR	European Convention on Human Rights
EcomHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
GC	Grand Chamber (of the European Court of Human Rights)
HR	'Hoge Raad' (Supreme Court of the Netherlands)
NJ	'Nederlandse Jurisprudentie' (main journal in which Dutch leading judgments are published)
Stcrt.	'Staatscourant' (official Dutch journal for publication of some types of legislation)



# 1 Introduction

This report was commissioned by the Open Society Foundation Georgia. It is part of a broader project which intends to compare Georgian law concerning the procedure surrounding prosecution witnesses to other jurisdictions. Prof. Richard Vogler of the University of Sussex (England) has submitted a report concerning the rules on prosecution witnesses in England and Wales, the United States of America, Canada, France and Germany.

In 2009, the new Code of Criminal Procedure (CCPG) of Georgia entered into force. This code replaced the interrogation of witnesses by an investigator by the interrogation before a magistrate judge. However, the provisions concerning the interrogation of witnesses of the former CCPG remained in force. The public prosecution department took the view that it would be impossible to bring a case to court if the investigator lost his authority to interrogate witnesses. Another relevant aspect of witness interrogation is the position of the witness, who makes himself criminally liable if he changes a previous statement. Mainly, these two aspects gave rise to this comparative witness project.

In this report, Georgian law is compared to Dutch law and to the case-law of the European Court of Human Rights (ECtHR). Chapter 2 concludes with brief answers to the questions provided by the Open Society Foundation Georgia. The comparison to Dutch criminal law is interesting because in the Netherlands pre-trial witness statements – collected during investigation by an investigator or before an investigating judge – can, as a general rule, be used as evidence. Dutch practice shows that witness statements are seldom made during trial. Pre-trial witness statements are read out during trial. This aspect does not have to be justified by special reasons. Georgia is a contracting state to the European Convention on Human Rights (ECHR). It is, therefore, relevant to also compare Georgian law to ECtHR case-law.

Four aspects of prosecution witnesses are emphasized. First, the use of pre-trial witness statements as evidence. Second, the rules applicable to the questioning of witnesses. Third, the position of the defence with respect to witnesses, and more specifically the right to examine witnesses and the right to equality of arms. Fourth, the position of the witness. In Georgian law a legal distinction is made between witness ‘interrogations’ and witness ‘interviews’. In the chapter concerning Georgian law, these concepts are strictly separated. In



the chapters about Dutch law and about the ECHR the terms 'interrogation', 'interview', 'questioning' and 'hearing' are convertible.

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May 2015

# **1                      Prosecution Witnesses in Georgia**

*No case-law or literature was analyzed in preparing this chapter. Therefore, certain rules may be differently interpreted in practice.*

## **1.1      Introduction**

In 2009, the new CCPG entered into force. However, Article 332 CCPG 2009 reads: ‘Until December 31, 2015, the interrogation during investigation shall be administered according to the procedure provided in Criminal Procedure Code of Georgia of February 20, 1998’. The period during which this transitional provision is valid has been extended several times.

## **1.2      Use of Witness Statements as Evidence**

### *1.2.1    Admissibility of Hearsay Evidence*

The CCPG 1998 did not prohibit the use of hearsay evidence. Under the CCPG 2009, witnesses are, as a rule, required to make a statement during trial. As a rule, hearsay evidence is inadmissible. In special circumstances however, the statement a witness made during the pre-trial investigation before a magistrate judge can be read out during trial or an audio or video recording of the statement can be played back during trial. The pre-trial statement can then be used as evidence. The applicable rules depend on the specific reason for not appearing in court. If there is a real threat to the witness’s life or health or if it necessary to apply special protective measures, Article 118 § 3 CCPG 2009 determines that the pre-trial statement can be read out during trial. A conviction may, however, not rest solely on the pre-trial statement of the witness. If a witness who was interrogated before a magistrate judge is deceased, is outside Georgia, cannot be traced or did not appear in court although the judicial authorities made all reasonable efforts to that effect, Article 243 makes clear that the previous statement may be read out at trial, provided the earlier testimony was made in accordance with the rules prescribed by the CCPG 2009. In the latter case, the CCPG 2009 will not demand evidence supporting the witness statement. Witness statements not produced before a judge – for

example statements made during police interviews – are under no circumstances admissible as evidence.<sup>1</sup>

If a witness has testified about information related by another person, his statement is treated as indirect evidence. This type of evidence is admissible under two conditions. First, the witness must disclose the identity of the person who supplied the information. Second, the witness statement must be supported by other non-indirect evidence.<sup>2</sup>

### *1.2.2 Requirements Regarding Witness Testimony*

A witness under CCPG 2009 is described as a ‘person who might be aware of the facts necessary for ascertaining the circumstances of a criminal case’.<sup>3</sup> Investigators, prosecutors, defendants, victims, experts and translators can have witness status.<sup>4</sup> Witness testimony is defined as ‘information on the circumstances of the case provided by the witness to the court in relation to the circumstances of the criminal case’.<sup>5</sup> Witnesses must indicate the source of information. Otherwise their statements are not admissible as evidence. Substantial contradictions in the testimony also render statements inadmissible.<sup>6</sup> If the defendant made a pre-trial statement in the capacity of a witness, it will only be admissible as evidence if the defendant does not oppose its reading out at trial.<sup>7</sup>

The CCPG 1998 rules on evidence indicate that pre-trial witness statements can be used as evidence, provided that they meet the conditions set by the CCPG 1998 and have been legally obtained.<sup>8</sup> Witnesses are entitled to make written statements during the pre-trial investigation. Their written statements are admissible as evidence.<sup>9</sup> Evidence must be obtained without the use of physical or mental coercion.<sup>10</sup>

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<sup>1</sup> Compare Article 3 § 24 CCPG 2009. A police interview does not provide ‘testimony’. Article 243 CCPG 2009 strictly refers to testimony.

<sup>2</sup> Article 76 CCPG 2009.

<sup>3</sup> Article 3 § 20 CCPG 2009.

<sup>4</sup> Article 47 CCPG 2009. See specifically with regard to victims Article 56 § 1 and with regard to defendants Articles 230 § 1 and 247 § 1 CCPG 2009.

<sup>5</sup> Article 3 § 24 CCPG 2009.

<sup>6</sup> Article 75 CCPG 2009.

<sup>7</sup> Article 247 § 1 CCPG.

<sup>8</sup> Articles 110-132 CCPG 1998 contain the rules on evidence and proof.

<sup>9</sup> Article 118 § 2 1998.

<sup>10</sup> Article 119 CCPG 1998.

### 1.3 Overview of the Rules regarding Witness Interrogation

#### 1.3.1 Pre-trial Interrogation under the CCPG 2009

The CCPG 2009 makes a distinction between interviews and interrogations. An interview has a voluntary character. The witness can be asked by each of the parties to testify. He is not put under oath. The witness will have to be identified and his statement will be included in a report. This report must be made available to the opposite party,<sup>11</sup> but is not admissible as evidence<sup>12</sup>.

An interrogation does not have a voluntary character. Witnesses are obliged to appear. If a witness refuses to fulfil his legal duty, he may be found criminally liable. Interrogations are performed before a magistrate judge. This type of pre-trial interrogation is only permitted if one of the specified reasons exists, to be summarized as the expected unavailability of the witness during trial and the compliance with a request for international legal assistance. During an interrogation, the magistrate judge, defence and the prosecutor will have an opportunity to ask the witness questions.<sup>13</sup> The witness will first be examined by the party that requested the witness to be interrogated.<sup>14</sup> In 'the interests of justice' a witness can – on request of one of the parties – be interrogated without the knowledge and presence of the opposite party. Testimony provided by this witness will however be inadmissible if the witness can be examined afterwards.<sup>15</sup> The witness takes the oath and then delivers evidence.<sup>16</sup> The magistrate judge has authority to interrupt the witness if he speaks about circumstances irrelevant to the case.<sup>17</sup>

The witness interrogation is recorded. The witness must approve the record, if necessary after having indicated that the testimony has not been written down correctly. Such indication will have to lead to adjustments in the record.<sup>18</sup> The CCPG 2009 does not contain a provision regarding the audio or video recording of a witness interrogation.<sup>19</sup> However, the fact that Article 143

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<sup>11</sup> Article 75 lid 3 CCPG 2009.

<sup>12</sup> See footnote 1.

<sup>13</sup> Article 114 CCPG 2009.

<sup>14</sup> Article 118 § 1 CCPG 2009.

<sup>15</sup> Article 114 § 4 CCPG 2009. If the witness can be interrogated at a later stage, only the statement he makes at that occasion will be admissible as evidence.

<sup>16</sup> Article 115 § 1 CCPG 2009.

<sup>17</sup> Article 115 § 2 CCPG 2009.

<sup>18</sup> Article 134 CCPG 2009.

<sup>19</sup> Article 304 CCPG 1998 does contain a provision with respect to audio-recording of the interrogation. Articles 243 and 247 CCPG refer to video recordings as well, but the making of video recordings has not been regulated in the CCPG 2009 nor in the CCPG 1998. Article 10 CCPG 2009 indicates that video recordings can be made, but this provision appears to concern video recordings of the main hearing.

CCPG mentions that audio and video recordings can be played back during trial suggests that making recordings may be permissible.

Juveniles are heard in the presence of their legal representative or a psychologist. In addition, children under fourteen years of age can only be interrogated with the consent of their legal representative. They are not put under oath, but are informed about their duty to tell the truth.<sup>20</sup>

### *1.3.2 Pre-trial Interrogation under the CCPG 1998*

Although the CCPG 2009 replaced the CCPG 1998, the provisions of the CCPG 1998 concerning the pre-trial interrogation of witnesses remained in force. Under the CCPG 1998 no magistrate judge is involved in the interrogation. This interrogation is performed by an investigator, without the defence present. An investigator is a state official, authorized to investigate a criminal case. If a prosecutor performs an investigation himself, he is regarded an investigator.<sup>21</sup> The prosecutor is the formal authority in charge of the investigation.<sup>22</sup>

According to the CCPG 1998, a witness can be summoned to be interrogated.<sup>23</sup> His appearance is mandatory, since the witness is open to criminal liability for failing to appear without a valid excuse. He can be 'subjected to compelled attendance'.<sup>24</sup> The witness is obliged to answer the questions, unless doing so would incriminate himself or a close relative.<sup>25</sup> He may have the assistance of counsel.<sup>26</sup>

The witness may be interrogated about circumstances relevant to the case or, in order to identify a suspect, defendant or victim.<sup>27</sup> After having ascertained the identity of the witness,<sup>28</sup> the witness is invited to tell everything he knows about the case. He may not be interrupted, unless he speaks about circumstances irrelevant to the investigated matter.<sup>29</sup> Subsequently, the investigator will ask him questions.<sup>30</sup> The investigator may not ask leading questions.<sup>31</sup> The duration of the investigation is limited to a maximum of four hours. Although a witness may be interrogated more than once in the same day, the total duration of this interrogation may not exceed eight hours and between

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<sup>20</sup> Article 116 § 3 CCPG 2009.

<sup>21</sup> Article 37 CCPG 2009.

<sup>22</sup> Articles 33 § 6 and 34 § 3 CCPG 2009.

<sup>23</sup> Article 295 CCPG 1998.

<sup>24</sup> Article 94 CCPG 1998.

<sup>25</sup> Article 305 § 3 CCPG 1998.

<sup>26</sup> Article 305 § 5 CCPG 1998.

<sup>27</sup> Article 305 § 1 CCPG 1998.

<sup>28</sup> Articles 296 and 305 § 3 CCPG 1998.

<sup>29</sup> Articles 298 § 1 and 305 § 4 CCPG 1998.

<sup>30</sup> Article 298 § 2 CCPG 1998.

<sup>31</sup> Article 299 CCPG 1998.

two interrogations at least one hour break must be afforded.<sup>32</sup> The witness is, as a rule, interrogated without other witnesses being present.<sup>33</sup> The investigator can however confront the witness with another witness if their statements are contradictory.<sup>34</sup>

Minor witnesses may also be interrogated. Witness under the age of sixteen years can only be interrogated in the presence of a teacher or legal representative. Witness under seven years of age must be interrogated in the presence of a parent or guardian or with the consent of a legal representative. The legal representative will have the opportunity to give his opinion and to put questions to the witness. Irrelevant and leading questions may be barred by the investigator. Witnesses under the age of fourteen years do not take the oath, but are informed of the necessity of speaking the truth.<sup>35</sup>

The investigator must draw up a report of the interrogation. The questions and answers must be included verbatim, as far as possible. The witness must be given the opportunity to read the record. Upon his request the report must be changed. Witnesses must be allowed to write down the testimony themselves. The witness must state that the report is accurate and must sign every page of the record.<sup>36</sup> An audio recording of the interrogation may be made.<sup>37</sup>

### *1.3.3 Examination during Trial*

It is the duty of the parties to ensure the appearance of their witnesses in court.<sup>38</sup> If a witness fails to appear, a party can request the court to ensure the presence of the witness at trial.<sup>39</sup> The witness will then be summoned and will be legally obliged to appear.<sup>40</sup> If the witness nevertheless fails to appear, the court can compel such to be present.<sup>41</sup> The court session will be adjourned due to the non-appearance of an essential witness.<sup>42</sup>

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<sup>32</sup> Article 302 CCPG 1998.

<sup>33</sup> Article 305 § 2 CCPG 1998.

<sup>34</sup> Article 314 CCPG 1998.

<sup>35</sup> Article 306 CCPG 1998.

<sup>36</sup> Articles 303 and 308 CCPG 1998.

<sup>37</sup> Article 304 CCPG 1998. In general, interrogations may be recorded audio-visual (Art. 303 § 2 CCPG 1998), but specifically with respect to witness interrogation only audio recording appear to be allowed.

<sup>38</sup> Article 228 § 1 CCPG 2009.

<sup>39</sup> Article 149 § 1 CCPG 2009.

<sup>40</sup> The court is not authorized to summon a witness of its own initiative (Art. 228 § 2 CCPG 2009).

<sup>41</sup> Article 149 § 2 and 3 2009. This provision does not mention the way in which the witness's presence can be ensured. Probably the court will order that the witness is taken to the court by the police.

<sup>42</sup> Article 185 § 2 CCPG 2009.

Witnesses are separated from each other and examined individually.<sup>43</sup> Before being examined, the witness takes the oath.<sup>44</sup> The party calling the witness will be allowed to examine the witness first (direct examination). Subsequently, the other party will have the opportunity to cross-examine the witness. Leading questions are prohibited. The opposite party may object to a leading question by filing a motion to the presiding judge.<sup>45</sup> The court may decide to have a witness examined remotely, with the use of technical means.<sup>46</sup> If witness statements substantially contradict each other, any party can file a motion in order to have a video of audio recording of a pre-trial interrogation played back during the trial.<sup>47</sup>

Defendants may be examined as witnesses. It is not clear whether they may only testify in their own case or also in the case of a co-defendant.<sup>48</sup> If the defendant made a pre-trial witness statement, this is only admissible as evidence if the defendant does not oppose it being read out or played back in court.<sup>49</sup>

## **1.4 Position of the Defence**

### **1.4.1 Right to Equality of Arms**

From the start of the prosecution, equality of arms must be respected.<sup>50</sup> The court must offer both parties equal opportunity to protect their rights and legitimate interests.<sup>51</sup> The parties must have equal opportunity to present and examine evidence.<sup>52</sup> Despite the principle of equality of arms, the defendant can be denied the right to be present during the examination a witness, in order to protect the witness.<sup>53</sup> Also, if the interests of justice require so, a witness can be examined during the pre-trial interrogation without the knowledge and presence of the opposite party. The statement the witness makes without the opposite party present is only admissible as evidence if the opposite party had no opportunity of examining the witness during trial.<sup>54</sup>

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<sup>43</sup> Article 228 § 5 CCPG 2009.

<sup>44</sup> Article 48 CCPG 2009.

<sup>45</sup> Articles 244-246 CCPG 2009.

<sup>46</sup> Article 243 § 3 CCPG 2009. Probably a live video link is used.

<sup>47</sup> Article 243 § 2 CCPG 2009.

<sup>48</sup> Article 230 § 1 CCPG 2009 mentions this possibility. This provision does not mention for what purpose a defendant would wish to be heard as a witness.

<sup>49</sup> Article 247 § 1 CCPG 2009.

<sup>50</sup> Article 9 § 1 CCPG 2009.

<sup>51</sup> Article 25 § 1 CCPG 2009.

<sup>52</sup> Article 14 § 1, 39 § 1 and 75 § 3 CCPG 2009.

<sup>53</sup> Article 40 § 1 CCPG 2009.

<sup>54</sup> Article 114 § 4 CCPG 2009.

### 1.4.2 *Right to Examine Witnesses*

The position of the defence during the pre-trial interrogation by an investigator is not entirely clear. The accused and his counsel seem not to be entitled to attend the interrogation.<sup>55</sup> However, according to the CCPG 2009 a written witness interrogation protocol must be made available to the defence at least five days before pre-trial interrogation.<sup>56</sup> This suggests that the defence will have an opportunity to at least reflect on the protocol.

According to the CCPG 2009, the defendant will be entitled to exercise his right to cross-examine witnesses during trial. If a witness does not appear at trial and the pre-trial testimony is read out, nothing prevents the court from convicting the defendant based on this testimony. Admittedly, Article 118 § 3 CCPG prescribes that testimony obtained during a pre-trial interrogation should, in some situations, be corroborated by other evidence if it is read out during trial.<sup>57</sup> It does however not prevent a court from convicting an accused to a decisive degree on the testimony the witness made before an investigator.

## 1.5 **Position of the Witness**

Witnesses have the right to refuse to answer questions if answering would incriminate themselves or their close relatives.<sup>58</sup> Some people e.g. defence counsel and journalists, are – under certain circumstances – exempted from giving evidence as a witness.<sup>59</sup> If the defendant made a pre-trial statement as a witness, this is only admissible in evidence if the defendant agrees.<sup>60</sup>

Witnesses have obligations too. They are compelled to appear to be examined after being summoned and to respond to questions.<sup>61</sup> A witness who does not comply with these duties, may be criminally liable. S/he can also be compelled to appear.<sup>62</sup> Article 371 CCG penalizes as ‘impediment of the administration of justice’ to willfully give substantially contradictory evidence as a witness. According to this provision, a witness who made a false statement, is criminally liable if he retracts his statement at a later stage of the proceedings.

Although witnesses can, as a rule, be examined directly during trial, special protective measures are applicable in special circumstances. For example,

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<sup>55</sup> Article 304 § 2 CCPG 2009 mentions the objection by the defence to have an interrogation recorded, but this provision appears to be relevant only if a suspect or an accused is interrogated.

<sup>56</sup> Article 83 § 6 CCPG 2009.

<sup>57</sup> This provision is applicable at present if the witness was interrogated by an investigator.

<sup>58</sup> Article 49 § 1 CCPG 2009. Article 15 CCPG 2009 mentions the right not to incriminate oneself.

<sup>59</sup> Article 50 CCPG 2009.

<sup>60</sup> Article 247 CCPG 2009.

<sup>61</sup> Article 49 § 2 CCPG 2009.

<sup>62</sup> Article 94 § 2 CCPG 1998.



if the life, health or property of a witness would be significantly threatened by giving evidence unprotected, such protective measures can be employed.<sup>63</sup> The witness has the right to request for the application of protective measures.<sup>64</sup> If this request is granted, the witness will be examined during an interrogation before a magistrate judge.<sup>65</sup> If an audio or video recording of this interrogation is made, playing back this recording during trial may be admissible.<sup>66</sup>

A witness may have to make expenses, like travel expenses, if he has to appear to be examined. Victims are entitled to compensation for costs of participation in the criminal proceedings.<sup>67</sup> The CCPG 2009 does not contain a similar provision for witnesses who cannot be regarded as victims. Article 90 § 1(d) CCPG 2009 regards the costs for the appearance of a witness as ‘procedural costs’. The CCPG 2009 does not clarify however which party is responsible for reimbursement of witness expenses. Article 91 § 2 CCPG 2009 merely determines that a convicted person will be responsible for paying the costs related to *summoning* a witness. This provision does not indicate who will bear these costs if the defendant is acquitted and it is not completely clear whether it concerns other types of costs too, like travel expenses and lost wages.

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<sup>63</sup> Article 67(b) CCPG 2009.

<sup>64</sup> Article 49 § 1(f) CCPG 2009.

<sup>65</sup> Article 114 § 1(d) CCPG 2009.

<sup>66</sup> Article 243 § 2 CCPG 2009.

<sup>67</sup> Article 57 § 1(d) CCPG 2009.

## 2 Prosecution Witnesses in the Netherlands<sup>68</sup>

### 2.1 Use of Witness Statements as Evidence<sup>69</sup>

#### 2.1.1 Admissibility of Hearsay Evidence

One of the most striking aspects of Dutch criminal procedure is that witness testimony gathered during the pre-trial investigation can be used as evidence to prove the indictment, without serious limitations. Shortly after the present Code of Criminal Procedure entered into force, the Supreme Court decided that hearsay evidence could be used as evidence.<sup>70</sup> There are two requirements for this procedure, which are easy to satisfy. First, the pre-trial witness statement must be read out during trial. Second, the court must be cautious in its assessment of the statement. Current practice shows that courts primarily express a cautious attitude if the defence has challenged the reliability of the witness statement.

The use of pre-trial statements as evidence is not only admissible, but it is common practice. In the majority of cases in which pre-trial testimony was used as evidence, the witness has not appeared during trial. This practice is related to the fact that judging criminal cases is the exclusive authority of professional judges, and no forms of lay participation exist. The judges are not for the first time confronted with the evidence during trial, but have taken notice of all reports gathered during the pre-trial investigation before the trial commences. This includes police reports and reports by investigating judges in which witness statements are reported. With respect to this evidence the trial primarily has a verifying character: the court assesses the truthfulness of the facts and circumstances mentioned in the reports. Only in exceptional circumstances, especially if the defence has requested so, witnesses will be called to testify in court.

The fact that pre-trial witness statements are used as evidence, without the witness having testified in court, is in general not considered problematic.

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<sup>68</sup> See about the general features of Dutch criminal procedure Groenhuijsen & Simmelink 2008 and Tak 2003.

<sup>69</sup> Nijboer 1995 and Simmelink 2012 provide an overview of the rules in evidence in the Netherlands.

<sup>70</sup> HR 20 December 1926, *NJ* 1927, p. 85-91.

This can be explained by several reasons. First, the witness statement may be more reliable if it has been made shortly after the offence was committed. It is not unusual for trials to take place many months or even years after the offence was committed. Meanwhile the witness's recollection of the observed facts may have faded or news items in the media may have influenced memory. Second, an interrogation during trial may appear less effective than a pre-trial interrogation, because of the formal setting of the trial. A pre-trial interrogation *in camera* before the investigation judge has a relatively informal character. This may reinforce the witness's willingness to answer questions. Third, the argument of efficiency is considered relevant. Compared to trials in other countries, Dutch trials take a relatively short period of time. It is unusual for a trial to last for more than one day. This may occur if the case is complex or if the court decides that more investigation is required.

### *2.1.2 Requirements regarding Witness Testimony*

Witness statements are admissible as evidence only under the following conditions:

- The witness must have testified about facts and circumstances he observed.<sup>71</sup> A sole conclusion does not suffice, as the judge must be able to draw conclusions himself, based on the facts and circumstances mentioned by the witness.
- The statement may not be regarded as unreliable by the judge. Unreliable witness statements cannot be used as evidence.<sup>72</sup>
- The witness statement must be made during trial or must be read out during trial.<sup>73</sup>
- An accused cannot be convicted solely on one witness statement.<sup>74</sup> An exception is the report by an investigator who himself witnessed a criminal offence being committed. His report may constitute the sole basis for a conviction.<sup>75</sup>
- The conviction may not be based to a decisive degree upon anonymous witness statements.<sup>76</sup>
- The conviction may not be based solely on statements by co-accused who testified as witnesses in exchange for the affirmation that the prosecutor will demand a lower sentence than usual.<sup>77</sup>

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<sup>71</sup> Article 342 lid 1 CCPNL.

<sup>72</sup> HR 14 September 1992, *NJ* 1993/54.

<sup>73</sup> Article 342 lid 1 respectively 301 CCPNL.

<sup>74</sup> Article 342 lid 2 CCPNL.

<sup>75</sup> Article 344 lid 2 CCPNL.

<sup>76</sup> Article 344a lid 1 CCPNL.

<sup>77</sup> Article 344a lid 4 CCPNL.

- The conviction may not be based solely or to a decisive degree on the statement by a witness who could not be examined by the defence, unless sufficient counterbalance has been offered.<sup>78</sup>

Although Article 341 § 3 CCPNL provides that the statement made by the defendant can only provide evidence against himself, due to a very restrictive interpretation of this provision by the Supreme Court, statements by co-accused can be used as evidence, almost without limitation. The Supreme Court held that this provision is applicable only if two or more accused are accused in one indictment or two or more cases are joined, following a special procedure. In practice, this hardly ever occurs, because public prosecutors like to avoid that the statement of a co-accused will be inadmissible as evidence.<sup>79</sup>

If the defence has taken the view that a witness statement cannot be used as evidence, the court that nevertheless uses the statement as evidence is obliged to give reasons for rejecting the view of the defence.<sup>80</sup> Under some specific circumstances – for example if anonymous statements are used as evidence<sup>81</sup> – the court must give a reasoned decision on the use of a witness statement of its own motion.

## **2.2 Overview of the Rules regarding Witness Interrogation**

### *2.2.1 Pre-trial examination before an investigator*

An investigator is usually a police officer. The pre-trial interrogation by an investigator is barely regulated by the Code of Criminal Procedure. The only provision regarding the police interrogation concerns the fact that witnesses can report criminal offences to the police.<sup>82</sup> Since such a report often is the first cause to start a criminal investigation, the defence is usually not involved in the first police interrogation. If a witness is interrogated at a later stage of the police investigation, there is no obligation or common practice to invite the defence to participate. The public prosecutor will not be present either. The Ministry of Safety and Justice is currently preparing Legislation which will create an obligation for the police to invite the defence to attend the examination of a witness in specific circumstances. Probably this will concern situations in which it can be foreseen that the witness will not be able to be questioned at a later

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<sup>78</sup> HR 29 January 2013, *NJ* 2013/145; elaborated in § 2.3.2.

<sup>79</sup> HR 29 October 1974, *NJ* 1975, 108.

<sup>80</sup> Article 359 § 2 CCPNL.

<sup>81</sup> Article 360 CCPNL.

<sup>82</sup> Article 163 CCPNL.

stage of the proceedings, for example because the witness is a young child, the witness is seriously ill or the witness is a foreign tourist.

Witnesses are not compelled to appear if they are invited to be interrogated by the police. They do not take the oath and therefore cannot make themselves criminally liable for perjury. Their statements are recorded in an official police record. The police record must meet certain formal requirements.<sup>83</sup> The CCPNL does not contain general rules with respect to the way in which statements must be recorded.

The examination of children up to 12 years of age and of mentally disabled witnesses is, with respect to sexual offences and child abuse, guided by directions by the public prosecution department.<sup>84</sup> These witnesses are interrogated in child-friendly studios, by a police officer especially trained to interrogate these types of witnesses. The studio interrogation is recorded audio-visually.<sup>85</sup> With respect to sexual offences the direction prescribes that the interrogation is performed in question-answer-style and is recorded in a police record verbatim. The defence must be able to watch the audio-visual recording. The direction contains no rules on the presence of the defence during a studio interrogation or on the opportunity for the defence to supply questions to the police officer who will carry out the interrogation. A witness can not only be interrogated in a studio on the initiative of the police. Courts may also decide that a witness be examined this way. Usually, this will be a second studio interrogation, which takes place in order to enable the defence to practice its right to examine witnesses.

If a witness is interrogated with respect to a serious offence, specifically mentioned in the directions of the public prosecution department, an audio recording must be made. This obligation exists for example if the offender risks a term of imprisonment of twelve years or more. An audio-recording will also have to be made if the victim of the offence has deceased.

### 2.2.2 Pre-trial examination before an investigating judge

The investigating judge (*rechter-commissaris*) is an independent and impartial judge, who has authority to perform certain investigative activities. He does not work under supervision or in commission of the public prosecution service. An investigating judge who investigated a certain case, is not allowed to take part in the trial of that case, as this could create the impression that he would not be

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<sup>83</sup> Articles 152-153 CCPNL.

<sup>84</sup> Aanwijzing opsporing en vervolging inzake seksueel misbruik, *Stcrt.* 2010, 19123 (2010A026) en Aanwijzing opsporing en vervolging inzake kindermishandeling, *Stcrt.* 2010, 16597 (2010A0424).

<sup>85</sup> Zie daarover ook de Aanwijzing auditief en audiovisueel registreren van verhoren van aangevers, getuigen en verdachten, *Stcrt.* 2012, 26900 (2010A018gp).

impartial any more.<sup>86</sup> Interrogation of witnesses, most of whom are previously interrogated by police officers, is an important task of the investigating judge. There are two relevant differences between police interrogation and interrogation by an investigating judge. First, the police are not impartial. Second, as a rule, the parties will be invited to be present at the hearing before the investigating judge, but not to attend the police interrogation. The presence of the parties may prevent the investigating judge from asking leading questions.

An investigating judge can hear a witness on the application of the public prosecutor,<sup>87</sup> on request of the defence,<sup>88</sup> following the order of the trial judge<sup>89</sup> or on his own initiative<sup>90</sup>. It is relevant to know on what grounds it is decided whether a witness who was previously interrogated by the police, should be re-examined by the police or by an investigating judge if a second examination is considered desirable. The CCPNL does not provide substantial guidance here.<sup>91</sup> The public prosecutor and the defence determine themselves whether a re-examination by the police or before an investigating judge is desirable. The most important reason why witnesses are heard before the investigating judge is that the defence wishes to interrogate the witness. Normally, the defence is not offered an opportunity to do so during the police investigation. Even if such an opportunity was offered, it is considered important to have an opportunity to interrogate the witness before an independent judge, who can put the witness under oath and who has the power to order the appearance of the witness.

A witness who has been summoned to appear before the investigating judge, possibly under the judge's order that he will be brought to court, is compelled to appear.<sup>92</sup> As a rule, he has the obligation to answer the judge's or parties' questions. An exception to this rule may occur if the investigating judge prohibits that the witness answers a question<sup>93</sup> or if the witness has the statutory right to remain silent<sup>94</sup>. If the witness refuses to provide answers without a valid reason, he can – in exceptional situations – be taken in custody.<sup>95</sup>

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<sup>86</sup> Article 268 § 2 CCPNL.

<sup>87</sup> Article 181 CCPNL.

<sup>88</sup> Article 182 CCPNL.

<sup>89</sup> Article 316 CCPNL.

<sup>90</sup> Article 182 § 7 CCPNL.

<sup>91</sup> In § 2.2.3 the opportunity for the trial court to redirect a witness examination to an investigating judge is discussed. If the trial court decides to have a witness examined, this examination will as a rule take place before an investigating judge. In exceptional circumstances the police can be ordered to re-examine a child witness. The reason for this order is that the police has at its disposal special child-friendly studios and police officers especially trained to interrogate children.

<sup>92</sup> Article 213 CCPNL in conjunction with Article 444 CCNL.

<sup>93</sup> Article 187b CCPNL.

<sup>94</sup> Articles 217-219b CCPNL.

<sup>95</sup> Article 221 CCPNL.

Usually the accused's counsel and the public prosecutor have the right to attend the hearing. Counsel may, however, be excluded if the investigating judge decides that the interests of the investigation have to prevail.<sup>96</sup> The accused himself has no right to be present at the interrogation of a witness. However, the investigating judge can allow him to attend the hearing if he holds the view that the investigation will benefit from the accused's presence.<sup>97</sup> This opportunity is rarely used. The witness is usually examined in the investigating judge's office. He can however be heard at the place where he resides,<sup>98</sup> for example if he is seriously ill. As a rule, the witness is not put under oath. Instead, he will have to state that he will speak the truth.<sup>99</sup> Making a false statement will not amount to perjury. Only in exceptional situations, for example if the investigating judge suspects that the witness will not be able to appear in court, will the witness have to take the oath.<sup>100</sup> In that case, the witness may be found criminally liable if he makes a false statement. The oath is reserved for specific situations because the point of departure is that a witness should be able to change his testimony during trial without committing perjury.<sup>101</sup>

The witness's testimony is registered in a record of the hearing. Usually this is drawn up only after the witness has answered all questions. A clerk of the investigating judge will write down the summarized statement dictated by the investigating judge. The witness will then be asked to sign the statement.

### *2.2.3 Examination during Trial*

The public prosecutor can decide to call witnesses to appear during trial on his/her own initiative or upon defence request or court order. As a rule, the public prosecutor will have to call the witnesses requested by the defence, provided that their statements may be relevant for the court's decision. S/he can however reject witness requests by the defence, provided that one of the grounds mentioned in the CCPNL is applicable. For example, the witness is seriously ill or cannot be located.<sup>102</sup> In the event of the public prosecutor denying a request or non-appearance of a witness, the defence can repeat the request before the trial court. The defence may also make a first request for a

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<sup>96</sup> Article 186a lid 1 CCPNL.

<sup>97</sup> Article 186a lid 2 CCPNL.

<sup>98</sup> Article 212 CCPNL.

<sup>99</sup> Article 215 CCPNL.

<sup>100</sup> Article 216 CCPNL. The CCPNL does not mention specific circumstances. This provision is applicable for example if it is expected that the witness will die soon, if the witness will be shielded from testifying in court because of his special vulnerability and if the witness is a foreign resident that will leave the country shortly.

<sup>101</sup> Perjury is only committable if the witness makes a false statement under oath.

<sup>102</sup> Article 264 CCPNL. In § 2.3.2 the grounds for rejecting a request are mentioned more exact.

witness during the trial, but the trial court will then have to apply a stricter criterion: only if it is considered necessary to call the witness, the court will be obliged to have the witness called.<sup>103</sup>

A witness that has been called to appear is obliged to appear. If he fails to do so without a valid reason, he will be criminally liable.<sup>104</sup> The witness takes the oath before being interrogated.<sup>105</sup> Witnesses will first be interrogated by the party on whose initiative they were called. Witnesses are bound to answer the questions, unless the court prohibits an answer<sup>106</sup> or the witness is exempted from answering<sup>107</sup>. If the witness refuses to answer without a valid reason, he can, if certain conditions are met, be taken in custody.<sup>108</sup>

As mentioned before, the defence can request to have a witness called during trial. If the court grants the request, it usually instructs an investigating judge, who will not be present during the trial, to hear the witness *in camera*.<sup>109</sup> There can be different reasons to do so. Often, the efficiency of the criminal proceedings will be relevant. The calling of a witness is not always successful. If a witness fails to appear, a court hearing would have to be suspended again. Moreover, in more serious cases, a court session will require the presence of three judges, a public prosecutor and a clerk of the court, whereas the examination before the investigating judge will require only the presence of one investigating judge, who will only call for a clerk to record the witness statement at the end of the hearing. Substantive reasons too can justify a hearing before an investigating judge. For example, for some witnesses a hearing during trial can be too demanding. After the investigating judge has examined the witness, the trial will be resumed.

Article 316 § 2 CCPNL provides the possibility of redirecting a witness examination to one of the judges taking part in the trial, who may continue to judge the case after the examination is finished. He is referred to as a 'delegate judge'. The CCPNL does not require a special ground for redirecting the examination to a delegate judge. A hearing before a delegate judge has several advantages. First, a judge who is well informed about the case will examine the witness, which is more efficient than instructing an investigating judge without any knowledge of the case. Second, the delegate judge, who will continue to participate in the trial and will ultimately co-decide on the accused's guilt, can

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<sup>103</sup> Article 315 CCPNL.

<sup>104</sup> Article 444 CCNL.

<sup>105</sup> Article 290 § 4 CCPNL.

<sup>106</sup> Article 293 CCPNL.

<sup>107</sup> Article 290 § 5 CCPNL.

<sup>108</sup> Article 294 CCPNL.

<sup>109</sup> Article 316 CCPNL. The trial will be suspended if the investigating judge is instructed to organize a witness interrogation.



form an impression of the witness's reliability.<sup>110</sup> A delegate judge's only task can be the interrogation of a witness or the appointment of an expert. According to the Minister of Justice who introduced the delegate judge in the CCPNL, these activities do not impair the judge's impartiality.<sup>111</sup>

If a witness is interrogated before an investigating judge or a delegate judge, the rules mentioned in § 2.2.2 are applicable.

If a witness is expected not to appear of his own free will, the court can order that he be taken to the court by the police.

#### *2.2.4 Indirect examination*

In the situations mentioned before, an accused, counsel, prosecutor or judge asked his own questions to a witness directly. Besides, witnesses can sometimes be asked to answer written questions provided by the defence or the public prosecutor. In mainly two situations this indirect way of questioning is applied. First, the parties will usually not be allowed to attend the hearing of an anonymous 'threatened witnesses'. The CCPNL prescribes that the parties must be offered the opportunity to provide questions that will be asked by the investigating judge responsible for hearing the anonymous witness. Second, if a witness resides abroad and is examined under letters rogatory by an investigating judge, sometimes the defence is not allowed to be present. If so, the defence can be offered to provide written questions.<sup>112</sup>

### **2.3 Position of the Defence**

#### *2.3.1 Right to Equality of Arms*

Police interrogations of witnesses are usually not attended by the defence and the public prosecutor. The public prosecutor is formally in lead of the police investigation. On first thoughts, the right to equality of arms seems to be infringed if the defence had no opportunity to question the witness during a police interrogation. The practical influence of the public prosecutor is however virtually absent, as the public prosecutor will not instruct the police how to

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<sup>110</sup> The investigating judge is not allowed to take part in the trial if he investigated the case before as an investigating judge.

<sup>111</sup> *Kamerstukken II* 2001/02, 28477, nr. 3.

<sup>112</sup> The CCPNL does not contain rules with respect to this second situation. ECtHR 3 March 2011, appl.no. 31240/03 (Zhukovskiy/Ukraine), § 46 indicates that the defence must have the opportunity to comment on questions intended to be asked to the witness in this situation. A reasonable interpretation would be that the defence must have the opportunity to provide its own questions as well.

perform the interrogation and will not be present himself. Moreover, in Dutch practice the public prosecutor responsible for the investigation usually is not the same prosecutor who is the opposite party during trial.

If a witness is interrogated before an investigating judge, as a rule both the accused's counsel and the public prosecutor have the right to be present. If counsel is not invited for the interrogation, the public prosecutor will not be allowed to be present either. The CCPNL states so explicitly with respect to anonymous witnesses who have received the status of 'threatened witness' following a special procedure.<sup>113</sup> If the accused is not assisted by counsel and is not allowed to attend the interrogation, the investigating judge will have to order that the accused is allocated counsel if such counsel would be authorized to be present at the interrogation.<sup>114</sup> The primary purpose of this provision is to safeguard the right to examine witnesses. At the same time the application of the provision will amount to realization of equality of arms.

During trial an accused can be removed from the court room, for example for misbehaviour. If this measure is taken, the accused's counsel will retain the right to attend the hearing and to examine witnesses.

### 2.3.2 *Right to Examine Witnesses*<sup>115</sup>

The defence has the right to examine witnesses who made statements incriminating the accused. As witnesses do not have to testify during trial in order to make their pre-trial statements admissible as evidence, the defence will have to request that witnesses be called to testify in court. Requests for witnesses can be rejected, but only if a specific circumstance, mentioned in the CCPNL, occurs. The following circumstances are the most important:

- 1 It is not likely that the witness will appear in court within a reasonable period of time.
- 2 The health or well-being of the witness will be endangered by making a statement and the prevention of this danger prevails over the interest of the accused to interrogate the witness.
- 3 The accused cannot reasonably be harmed in his defence by rejecting the request.<sup>116</sup>

As mentioned before, pre-trial witness statements can in general be used as evidence, without the witness being required to repeat his statement at trial. This has a consequence that the interrogation of witnesses by the defence

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<sup>113</sup> Article 226d § 1 CCPNL.

<sup>114</sup> Article 187a CCPNL.

<sup>115</sup> See more extensive on the right to examine witnesses: De Wilde 2015.

<sup>116</sup> Articles 264 and 288 CCPNL.

usually is exercised during the pre-trial investigation too, before an investigating judge or – in rare cases – at a police station. The basic principle of Dutch criminal procedure is that the defence must have had an opportunity to test the reliability of a witness statement by interrogating the witness at any stage of the proceedings, either during trial or before.<sup>117</sup> Subsequently, there must be an opportunity for the defence to contest the witness statement before the trial court. This can be done by including this issue in the pleadings before the court.<sup>118</sup>

The CCPNL does not contain general rules on the admissibility of pre-trial statements by witnesses who could not be questioned by the defence.<sup>119</sup> The applicable rules are provided by the Supreme Court.<sup>120</sup> They can be summarized as follows. Pre-trial testimony untested by the defence is admissible as evidence if the testimony is sufficiently corroborated in other evidence. The other evidence must corroborate those parts of the witness statement challenged by the defendant. If insufficient corroborating evidence is available, the testimony may only be used as evidence if sufficient counterbalancing measures are taken. Examples of counterbalancing measures are playing back a video recording of a witness interview and the assessment of the reliability of the witness statement by an expert.

## **2.4 Position of the Witness**

Recently, the position of the victim has been laid down in the CCPNL. For example, victims have the right to legal assistance, the right to speak about the consequences of the offence during trial and the right to be informed about developments in the criminal procedure. Victims often are witnesses too. A witness who was the victim of a criminal offence, is often more vulnerable than an 'ordinary' witness. Therefore, measures may be taken to protect the witness. In exceptional circumstances, a measure may be that the request to question the witness is rejected in order to protect the well-being of the witness.

At present, the CCPNL does not provide rules on the position of persons acting as witnesses in criminal procedures without being victims. However, an act of parliament is prepared which will introduce a special section of the CCPNL in which both obligations (e.g. the obligation to appear and to answer questions) and rights (e.g. right to be exempted from answering questions and the right to have travel expenses reimbursed) will be laid down. By the way, most of these

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<sup>117</sup> HR 29 January 2013, *NJ* 2013/145.

<sup>118</sup> There are no formal requirements with respect to contesting witness statements.

<sup>119</sup> Article 344a CCPNL only provides rules on the use of anonymous witness statements.

<sup>120</sup> HR 29 January 2013, *NJ* 2013/145.

obligations and rights are already incorporated in the present rules on criminal procedure.

Witnesses testifying at trial, must take the oath. In special circumstances, they will be put under oath too if they are questioned before an investigating judge. Making a false statement under oath deliberately will amount to perjury.<sup>121</sup> The finding that a witness made a false statement may not be based solely of the fact that a witness changed or withdrew his previous statement. The sole fact that two statements by the same witness are incompatible does not justify the conclusion that the statement made under oath is correct. It could as well be the other way around. In this regard, it is relevant to take into account the fact that a statement made to the police, not being an independent and impartial instance, may be made due to pressure by the police. This risk is absent if a witness is heard before a judge.

Witnesses who are called to be questioned before an investigating judge or at trial, are compelled to appear.<sup>122</sup> They have an obligation to answer questions,<sup>123</sup> unless they are exempted from answering by the CCPNL<sup>124</sup> or a judge prohibits certain answers<sup>125</sup>. If a judge wishes to put a witness under oath – which is obligatory for the trial judge and optional for the investigating judge – the witness is obliged to take the oath.<sup>126</sup> Non-compliance with these obligations will amount to a criminal offence.<sup>127</sup> If a witness refuses to answer questions, a judge may decide to take the witness in custody if the conditions to take this measure are fulfilled.<sup>128</sup>

## 2.5 The Netherlands: Comparative Questionnaire

### 1 When does the witness interrogation/interview take place?

*Usually, witnesses only testify during the pre-trial investigation. Most witnesses are initially questioned by the police. Sometimes they are subsequently interrogated before an investigating judge.<sup>129</sup> The appearance of a witness at trial is exceptional. The trial court may for example decide to have a witness called because it wishes to form an*

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<sup>121</sup> Article 207 CCNL.

<sup>122</sup> Article 213 CCPNL.

<sup>123</sup> Article 221 CCPNL and HR 8 September 1998, NJ 1998/879.

<sup>124</sup> Articles 217-219b and 290 § 5 CCPNL.

<sup>125</sup> Articles 190 § 3 and 290 § 3 CCPNL.

<sup>126</sup> Articles 215 and 290 lid 4 CCPNL.

<sup>127</sup> Articles 192 and 444 CCNL.

<sup>128</sup> Articles 221 and 294 CCPNL.

<sup>129</sup> Elaborated in § 2.2.2.

*impression of the witness's reliability. The examination of a witness by the defence usually takes place before an investigating judge.*

- 2 What is the probative value of witness interrogation/interview protocols?

*Witness interrogation/interview protocols are hardly used and do not have any probative value. Only the answers to the questions included in the protocol have probative value.*

- 3 Who conducts witness interrogation? Can the witness be interrogated only before the judge? Can the witness be interrogated *in camera* by the prosecutor, investigator? What is the procedure for witness interrogation? What is the procedure for *subpoena*-ing the witness to the prosecutor and to the court?

*Witnesses can be questioned by the police, by an investigating judge and by a trial judge. As a rule, the public prosecutor and the defence are not invited to attend the police examination. They may be invited if it is expected that it will be impossible to question the witness afterwards, for example because he is a foreign resident. However, this hardly ever occurs. The prosecutor and the accused's counsel do have the right to attend the hearing before an investigating judge. Although the CCPNL does not explicitly authorize the public prosecutor to question a witness in the absence of an investigating judge, this does not seem to be prohibited either. In practice witnesses are not questioned by the public prosecutor alone. In § 2.2 the procedures concerning the interrogation of witnesses are described. Witnesses are called to testify and are compelled to appear.*

4. If the prosecutor/investigator can interrogate the witness, can the witness change the content of his testimony afterwards during the court hearing? If yes, what are the consequences (e.g. contempt of court, criminal offense)?

*At trial, a witness must speak the truth. If he made a false statement during pre-trial questioning, he can change or withdraw his statement without making himself criminally liable, because during pre-trial questioning he does not testify under oath.*

- 5 If the prosecutor/investigator can interrogate the witness, how is "equality of arms" achieved? Can the defence also interrogate the

witness in camera? Or can they be present during the prosecutor's/investigator's interrogation? What is the justification for interfering with the principle of "equality of arms"? Does the defence receive any compensation for this interference?

*The public prosecutor and the defence are usually not present at a police interrogation of a witness. It can be asserted that at this stage of the proceedings equality of arms is not respected, as the police operate under the authority of the public prosecutor. This is however not considered a problem, since the defence has the right to question the witness at a later stage of the proceedings, which offers counterbalance. If the trial as a whole is taken into consideration, the right to equality of arms is not violated. Witness interrogation before the investigating judge may usually be attended by both the public prosecutor and the defence. If the defence is excluded from being present, the public prosecutor will not be allowed to attend the hearing either.*

- 6 If the prosecutor/investigator can interrogate the witness *in camera*, are there safeguards for the witness which ensure that the testimony is voluntary and free from any form of coercion? If the witness refuses to appear before the prosecutor, what are the measures which can be used against him or her?

*If a witness is invited to be questioned by an investigator, usually a police officer, he is not compelled to appear or to make a statement. He does not take the oath and can therefore not commit perjury.*

- 7 If the prosecutor/investigator cannot interrogate the witness (and are only able to interview the witness) how can they take the case to court (this includes all the stages of judicial review of investigation and also main court hearing)? How can the prosecutor be sure the witness will not change the content of the witness interview?

*The distinction between 'interrogation' and 'interview' is not made in Dutch criminal law. The statement made by the witness under interrogation is included in an official police report. This testimony can be used as evidence, provided that it is read out at the hearing. The reading out of statements is not dependent on special circumstances. The witness does not have an opportunity to change a statement once he made the statement that was laid down in a report by an investigator. It is possible,*

*however, that s/he makes a different statement at a later stage. The judge will then have to decide what statement is the most reliable.*

- 8 Can the witness be interrogated during the pre-trial stage of criminal proceedings? If yes, what are the grounds for interrogation? What are the procedures? Can the witness be interrogated during the pre-trial stage before the judge without the presence of the other party?

*As a rule, the witness is heard only during the pre-trial investigation. This does not require a specific justification. If a witness is heard before an investigating judge, the accused's counsel may be excluded from being present. In such a situation, the public prosecutor will not be allowed to be present either.*

- 9 When the country has the jury trial system, is it possible for the witness to be interrogated *in camera* by the prosecutor/investigator? What is the procedure regarding witness interrogation in jury trial?

*Dutch criminal law does not recognize any element of lay participation in the judicial capacity.*

## 3 Prosecution Witnesses under Article 6 ECHR

### 3.1 Use of Witness Statements as Evidence

#### 3.1.1 *The ECtHR's task*

In general, contracting states may determine which national rules must be applied regarding criminal procedure, including rules of evidence. National judges have the authority to decide on the guilt of the accused.<sup>130</sup> The task of the ECtHR is not to assess all aspects of the decision making process, as if it were an additional court of appeal, but to determine whether a specified human right has been violated.<sup>131</sup> The ECtHR has only a subsidiary role in assessing the decisions of the national courts.<sup>132</sup> As a rule, the national court is not limited in fact-finding,<sup>133</sup> as the ECHR does not contain provisions regarding evidence.<sup>134</sup> If a national court has made mistakes in fact-finding or made legal errors, it is not the task of the ECtHR to correct these mistakes.<sup>135</sup> Even in cases where evidence was obtained in breach of the ECHR, it is – again as a rule – up to the national judge to determine whether it is admissible as evidence.<sup>136</sup>

With respect to witness testimony, the ECtHR's approach to its task is the following. It is the authority of the national court to determine whether a witness statement was collected lawfully, whether it is admissible as evidence and what the evidentiary value of the statement is.<sup>137</sup> The national court will have to assess the credibility of the witness and the reliability of his testimony.<sup>138</sup> If a witness has withdrawn an initial statement, it is the national court's task to

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<sup>130</sup> ECtHR 13 October 2005, appl.no. 36822/02 (Bracci/Italy), § 51.

<sup>131</sup> ECtHR 11 December 2008, appl.no. 6293/04 (Mirilashvili/Russia), § 161.

<sup>132</sup> ECtHR 16 July 2009, appl.no. 18002/02 (Gorgievski/Macedonia), § 53: 'The Court reiterates that its role in this matter is essentially subsidiary to that of the domestic authorities which are better placed than the Court to assess the credibility of evidence with a view to establishing the facts.'

<sup>133</sup> ECtHR 25 November 2005, appl.no. 72370/01 (dec.) (Van Thuil/Netherlands).

<sup>134</sup> ECtHR 11 December 2008, appl.no. 6293/04 (Mirilashvili/Russia), § 161.

<sup>135</sup> ECtHR 12 July 1988, appl.no. 10862/84 (Schenk/Switzerland), § 45.

<sup>136</sup> ECtHR 12 May 2000, appl.no. 35394/97 (Khan/United Kingdom), § 34.

<sup>137</sup> ECtHR 20 November 1989, appl.no. 11454/85 (Kostovski/Netherlands), § 39; ECtHR 26 April 1991, appl.no. 12398/86 (Asch/Austria), § 26; ECtHR 11 October 2001, appl.no. 31871/96 (Sommerfeld/Germany), § 62.

<sup>138</sup> ECtHR 6 November 2012, appl.no. 41867/04 (Borodin/Russia), § 158; EHRM 11 December 2008, appl.no. 6293/04 (Mirilashvili/Russia), § 161.



determine whether it can nevertheless be used as evidence.<sup>139</sup> If different statements made by the same persons contradict each other, the national court will have to decide what statement is admissible as evidence.<sup>140</sup>

In general, the court does not always have to rely on statements made on oath in preference to other statements<sup>141</sup> and statements made at trial do not always have to prevail over other pre-trial statements.<sup>142</sup> If a witness refuses to answer questions, the national court may decide to use the witness's earlier statement as evidence.<sup>143</sup> Finally, it falls within the national court's margin of appreciation to decide whether a conviction can be based to a decisive degree on statements made by co-accused.<sup>144</sup>

The national court's autonomy is not unlimited, however. Judicial decision may not violate a human right. If the ECtHR finds that a human right enshrined in the ECHR has not been respected, this may mean that the national court should have excluded a witness statement. An example is the violation of Article 3 ECHR. The sole fact that a witness was forced to make a statement, does not prohibit the national court from using the statement as evidence. However, a statement that was made under torture is under no condition admissible as evidence.<sup>145</sup> Another example concerns the exercise of the right to examine witnesses (Art. 6 lid 3 sub d ECHR). The national court may decide to use the statement by a witness who has not been subjected to an examination by the defence, as evidence. However, if the failure to provide an opportunity to question the witness lacks a good reason or if the witness statement is of decisive importance, the ECtHR may find a violation of the right to examine witnesses.<sup>146</sup>

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<sup>139</sup> ECtHR 26 March 1996, appl.no. 20524/92 (Doorson/Netherlands), § 77-78.

<sup>140</sup> ECtHR 8 December 2009, appl.no. 44023/02 (Caka/Albania), § 105.

<sup>141</sup> ECtHR 26 March 1996, appl.no. 20524/92 (Doorson/Netherlands), § 78. In ECtHR 27 January 2011, appl.no. 24460/04 (Shanin/Russia), § 57 the ECtHR added: 'The above does not exclude that the credibility and weight of an ordinary deposition, which is not punishable for perjury, may be called into question in the circumstances of a given case.'

<sup>142</sup> ECtHR 8 April 2003, appl.no. 39470/98 (dec.) (Lindgren/Sweden), p. 8.

<sup>143</sup> ECtHR 26 April 1991, appl.no. 12398/86 (Asch/Austria), § 28; ECtHR 25 November 1999, appl.no. 30509/96 (dec.) (Vilhunen/Finland).

<sup>144</sup> ECtHR 7 June 2005, appl.no. 27549/02 (dec.) (Jerino/Italy), p. 12.

<sup>145</sup> ECtHR 1 June 2010, appl.no. 22978/05 (Gäfigen/Germany), § 166.

<sup>146</sup> ECtHR (GC) 15 December 2011, appl.nos. 26766/05 & 22228/06 (Al-Khawaja & Tahery/United Kingdom), § 119.

### 3.1.2 Admissibility of Hearsay Evidence

In many cases judged by the ECtHR, the national court used a witness statement made during the pre-trial investigation as evidence, while the statement was not repeated during trial. The statement, laid down in an official report, was read out during trial. This is regarded as hearsay evidence.

The ECtHR embraces the principle of immediacy. In the recent case of *Cutean v. Romania* it considered: 'The Court reiterates that an important aspect of fair criminal proceedings is the ability for the accused to be confronted with the witnesses in the presence of the judge who ultimately decides the case. The principle of immediacy is an important guarantee in criminal proceedings in which the observations made by the court about the demeanor and credibility of a witness may have important consequences for the accused'.<sup>147</sup> In earlier cases it already held: 'In principle, all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument'.<sup>148</sup> Specifically with respect to hearsay evidence in its decision in the *Thomas v. the United Kingdom* case the ECtHR stated: 'Article 6 §§ 1 and 3 (d) of the Convention contains a presumption against the use of hearsay evidence against a defendant in criminal proceedings'.<sup>149</sup> In this decision the ECtHR referred to the EComHR decision in the *Blastland v. the United Kingdom* case to explain for what reason judges should be reluctant to admit hearsay evidence in jury trials: 'The purpose of the rule [the prohibition of hearsay evidence/BW] in the jury trial system is partly to ensure that the best evidence is before the jury, who can evaluate the credibility and demeanour of the witness, and partly to avoid undue weight being given to evidence which cannot be tested by cross-examination'.<sup>150</sup>

The ECtHR's prefers witness statements made during trial for several reasons. First, the judges who take the decision on the defendant's guilt, will be able to form an impression of the credibility of the witness by observing the demeanour of the witness under questioning.<sup>151</sup> Second, the defence will be at a disadvantage since they may not be able to observe the witness's demeanour if the statement was made out of court, without the defence being present.<sup>152</sup> Third, witnesses often make such statements during police interrogations. The

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<sup>147</sup> ECtHR 2 December 2014, appl.no. 53150/12 (*Cutean/Romania*), § 60.

<sup>148</sup> ECtHR 20 November 1989, appl.no. 11454/85 (*Kostovski/Netherlands*), § 41; EHRM 6 November 2012, appl.no. 41867/04 (*Borodin/Russia*), § 159.

<sup>149</sup> ECtHR 10 May 2005, appl.no. 19354/02 (dec.) (*Thomas/United Kingdom*), p. 13.

<sup>150</sup> EComHR 7 Mar 1987, appl.no. 12045/86 (*Blastland/United Kingdom*).

<sup>151</sup> ECtHR 20 November 1989, appl.no. 11454/85 (*Kostovski/Netherlands*), § 43: 'each of the trial courts was precluded by the absence of the said anonymous persons from observing their demeanour under questioning and thus forming its own impression of their reliability.'

<sup>152</sup> ECtHR 6 September 2005, appl.no. 66976/01 (dec.) (*Hedström Axelsson/Sweden*), p. 17; ECtHR 12 July 2007, appl.no. 503/05 (*Kovač/Croatia*), § 30.

ECtHR considers police questioning primarily as an opportunity for the Public Prosecution Service to gather information in preparation of the trial. The public prosecutor, who can present incriminating evidence at trial, is not impartial. The judges are.<sup>153</sup>

Despite its reluctant position, the ECtHR has not excluded the use of hearsay evidence. Since in most contracting states hearsay evidence can under certain conditions be admissible as evidence, an absolute prohibition of hearsay evidence was unlikely.<sup>154</sup> According to the ECtHR, under certain circumstances, it may be necessary to admit pre-trial statements as evidence.<sup>155</sup> For example, the ECtHR has repeatedly emphasized the problems which the investigating authorities may encounter, especially if witnesses do not dare to testify at trial because they fear reprisal.<sup>156</sup> This may provide a good reason to admit the pre-trial witness statement as evidence. In the general principles in the *Huseyn v. Azerbaijan* case the ECtHR stated:

‘The Court considers that the notion of a fair and adversarial trial presupposes that, in principle, a tribunal should attach more weight to a witness’s testimony given at the trial hearing than to a record of his or her pre-trial questioning produced by the prosecution, unless there are good reasons to find otherwise. Among other reasons, this is because pre-trial questioning is primarily a process by which the prosecution gather information in preparation for the trial in order to support their case in court, whereas the tribunal conducting the trial is called upon to determine a defendant’s guilt following a fair assessment of all evidence actually produced at the trial, based on the direct examination of evidence in court.’<sup>157</sup>

On first thoughts, the ECtHR seems to introduce a high standard: only if good reason exists, a pre-trial witness statement can be used as evidence. A good reason is, however, accepted without real impediment. As a rule, a witness will not have to be questioned during trial if the defence has not challenged the credibility of the witness or the reliability of his statement. Furthermore, the

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<sup>153</sup> ECtHR 26 July 2011, appl.nos. 35485/05 et cetera (*Huseyn and others/Azerbaijan*), § 211; ECtHR 25 April 2013, appl.no. 51198/08 (*Erkapić/Croatia*), § 75.

<sup>154</sup> ECtHR 6 September 2005, appl.no. 66976/01 (dec.) (*Hedström Axelsson/Sweden*), p. 17.

<sup>155</sup> ECtHR 8 February 2007, appl.no. 25701/03 (*Kollcaku/Italy*), § 68.

<sup>156</sup> ECtHR 27 February 2001, appl.no. 33354/96 (*Lucà/Italy*), § 40; ECtHR 25 November 2008, appl.no. 8783/04 (dec.) (*Plyatsevyy/Ukraine*), p. 8; ECtHR 8 April 2003, appl.no. 39470/98 (dec.) (*Lindgren/Sweden*), p. 7.

<sup>157</sup> ECtHR 26 July 2011, appl.nos. 35485/05 et cetera (*Huseyn and others/Azerbaijan*), § 211.

efficiency of the criminal process may involve that a witness will not be required to testify at trial.<sup>158</sup>

### 3.3 Position of the Defence

#### 3.3.1 *Right to Equality of Arms*<sup>159</sup>

Although the right to equality of arms is not mentioned expressly in Article 6 ECHR, it is a fundamental aspect of the right to a fair trial.<sup>160</sup> The ECtHR has often explained the meaning of equality of arms as follows: ‘under the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent’.<sup>161</sup> Since in criminal cases the opponent is the public prosecutor, it must be determined whether the defence was in a disadvantageous position compared to the public prosecutor. The position of the defence does not have to be exactly equal to that of the public prosecutor.<sup>162</sup> To a certain extent inequality is permissible. For example, the fact that in most contracting states witnesses that made incriminating statements are called by the public prosecutor, while the defence does not have the opportunity to call them, does not in itself amount to a violation of equality of arms.

The public prosecutor has a stronger starting position than the accused. S/he has the opportunity to have evidence collected, to charge the accused and to present incriminating evidence. The right to equality of arms implies that the weaker position of the defence will have to be counterbalanced. He must for example have the opportunity to have himself assisted by counsel and to question the witnesses presented by the public prosecutor.

The sole fact that the public prosecutor was able to interrogate a witness without the defence present does not amount to a violation of the right to equality of arms. In some contracting states witnesses are interrogated by investigating officers, under the formal authority of the public prosecutor. Their statements are used as evidence. This is as such not considered a violation of equality of arms, because the ECtHR assesses whether the trial *as a whole* has been fair. The fact that the defence was not afforded an opportunity to examine

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<sup>158</sup> ECtHR (GC) 23 November 2006, appl.no. 73053/01 (Jussila/Finland), § 41-42 and 47-48.

<sup>159</sup> See more elaborately Wasek-Wiaderek 2000.

<sup>160</sup> EHRM 27 January 2004, appl.no. 44484/98 (dec.) (Lorsé/Nederland), p. 12; EHRM 22 January 2002, appl.no. 42011/98 (Oyston/United Kingdom), p. 9.

<sup>161</sup> EHRM 22 February 1996, appl.no. 17358/90 (Bulut/Austria), § 47.

<sup>162</sup> EHRM 27 January 2004, appl.no. 44484/98 (dec.) (Lorsé/Netherlands), p. 12; EHRM 22 January 2002, appl.no. 42011/98 (dec.) (Oyston/United Kingdom), p. 9.

a witness during the questioning by an investigating officer can be counterbalanced at a later stage of the proceedings. The defence can request for the witness to be called. If the witness appears, the defence will have an opportunity to test the witness's credibility. If the defence has not requested that the witness be called and the witness was not called on the court's or public prosecutor's initiative, the inequality will not be counterbalanced. However, the ECtHR will not find this fact alone a violation, because the defence failed to exhaust all available opportunities to examine the witness. It is important to note that the defence will not have to make a request if the witness must attend the trial, according to the rules of the contracting state, in order to make statements admissible as evidence.

In two Macedonian cases the ECtHR assessed the situation in which a witness was interrogated by the trial judge and the public prosecutor *in camera*, where the defence was not allowed to be present. The witnesses were undercover agents whose identities were not disclosed in order to retain the opportunity to make use of them in future operations. According to Macedonian criminal procedure, a witness could be interrogated in this way, provided that the defence was offered an opportunity to put questions in writing which had to be answered by the witness. In the *Papadakis v. Macedonia* case, the ECtHR did not agree with the application of this procedure, because the defence was offered only one hour time to study the witness statement and to put questions. This was not considered an adequate and proper opportunity to question the witness. In the cases of *Dončev & Burgov v. Macedonia* more time was seems to be offered to the defence case. The ECtHR blamed the defence for not having made use of the opportunity to put questions in writing. The right to examine witnesses had not been violated. Accordingly, the ECtHR seems to have had the view that equality of arms was sufficiently safeguarded by the Macedonian procedure, provided that the defence was offered a reasonable period of time for preparing questions.

A different issue regarding equality of arms with respect to the interrogation of witnesses is whether the defence was provided with sufficient information to enable it to effectively interrogate a witness. If the public prosecutor or an investigating officer had at his disposal information which was not shared with the defence, the right to equality of arms may be violated. In the case of *D. v. Finland* this was one of the considerations supporting the finding that the right to a fair trial had been violated.<sup>163</sup> It must be noted that the sole circumstance that

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<sup>163</sup> EHRM 7 July 2009, appl.no. 30542/04 (D./Finland), § 49 and 52. See more general about the effect of withholding evidence from the defence on the fairness of the procedure ECtHR (GC) 16 February 2000, appl.no. 28901/95 (Rowe & Davis/United Kingdom), EHRM 19 June 2001, appl.no.

some information was not disclosed does not justify the finding of a violation of the right to a fair trial.<sup>164</sup> In assessing this issue it is important to determine to what extent the non-disclosed material was crucial for questioning the witness, how important the witness statement was<sup>165</sup> and whether the defence was offered an adequate and proper opportunity to question the witness at a later stage of the proceedings.

### 3.3.2 Right to Examine Witnesses<sup>166</sup>

Article 6 § 3(d) ECHR affords the defendant the right to examine witnesses. This is not an absolute right. Only in specific circumstances will this right be considered violated if no adequate and proper opportunity to examine a witness was offered. The ECtHR has introduced a decision-making model in the cases of *Al-Khawaja & Tahery v. the United Kingdom*.<sup>167</sup> First, it will assess whether good reason exists for the lack of an adequate and proper opportunity to question the witness. The absence of a good reason in itself justifies the finding of a violation of the right to examine witnesses. If good reason exists, the ECtHR will examine whether the statement by the adequately and properly examined witness must be regarded as decisive evidence. As a rule, no violation will be found if the witness statement has a non-decisive nature.<sup>168</sup> If the statement is considered to be decisive, usually the right to examine witnesses is considered violated. However, this need not be an obstacle if the lack of defence questioning is sufficiently counterbalanced.<sup>169</sup>

This assessment is preceded by the question whether an adequate and proper opportunity was offered to question the witness. A relevant question is whether this should always be an opportunity during trial. In the *Kostovski v. the*

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36533/97 (Atlan/United Kingdom) and EHRM 24 June 2003, appl.no. 39482/98 (Dowsett/United Kingdom).

<sup>164</sup> In EHRM 3 April 2012, appl.no. 18475/05 (Chmura/Poland), § 53-57 the ECtHR judged that non-disclosed information did not make the interrogation of the witness ineffective.

<sup>165</sup> EHRM 12 December 2013, appl.no. 19165/08 (Donohoe/Ireland), § 78.

<sup>166</sup> See more elaborately about the right to examine witnesses De Wilde 2013, De Wilde 2015 and Maffei 2012.

<sup>167</sup> ECtHR (GC) 15 December 2011, appl.nos. 26766/05 & 22228/06 (*Al-Khawaja & Tahery/United Kingdom*), § 119.

<sup>168</sup> In ECtHR 17 April 2014, appl.no. 9154/10 (*Schatschaschwili/Germany*) the ECtHR has suggested that sufficient counterbalance must be offered too if the witness statement is not decisive. So far, the ECtHR has never based the finding of a violation of the right to examine witnesses on the impossibility to question a non-decisive witness.

<sup>169</sup> Sufficient counterbalance is accepted if the reliability of the witness statement could be tested in a way different from questioning the witness. Several factors can have a counterbalancing effect, for example playing back a video recording of a pre-trial witness interrogation and the opportunity to question other witnesses, to whom the key witness had told what he has observed.

*Netherlands* case the ECtHR held that an opportunity should be offered when the witness makes his statement or at a later stage of the proceedings.<sup>170</sup> Similar general considerations can be found in many ECtHR judgments, including more recent judgments.<sup>171</sup> At first sight, it therefore seems to be justified to state that a pre-trial questioning can provide sufficient opportunity to test the witness's reliability. There are, however, considerations that point in a different direction. In its judgment in the case of *Melnikov v. Russia* the ECtHR formulated as a general principle: 'it is preferable for such examination to take place in the course of adversarial proceedings before an independent and impartial tribunal'.<sup>172</sup> In the *Matytsina v. Russia* judgment the ECtHR went even further and held: 'Even where the defence was able to cross-examine a witness or an expert at the stage of the police investigation, it cannot replace cross-examination of that witness or expert at the trial before the judges.'<sup>173</sup> This consideration is formulated as a rule without an exception. In the same judgment the ECtHR approved the reading out of a pre-trial statement during trial during an oral examination of the witness at trial.<sup>174</sup>

It can be deduced from some judgments that the *Matytsina*-rule, formulated as recent as 2014, is in fact applied in the assessment of specific cases, but not every case.<sup>175</sup> If a witness could have been examined during the pre-trial investigation, this circumstance is sometimes regarded as a counterbalancing factor. Apparently, in these cases the pre-trial opportunity to question the witness was not considered an adequate and proper opportunity.<sup>176</sup> Other cases however point in a different direction. In these cases pre-trial questioning seems to have been considered an adequate and proper opportunity.<sup>177</sup> The ECtHR has not explained why it took different approaches in different cases.

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<sup>170</sup> EHRM 20 November 1989, appl.no. 11454/85 (*Kostovski/Netherlands*), § 41.

<sup>171</sup> EHRM 27 February 2014, appl.no. 5699/11 (*Lučić/Croatia*), § 84; EHRM 24 April 2012, appl.no. 1413/05 (*Sibgatullin/Russia*), § 50; EHRM 11 December 2012, appl.no. 3653/05 et cetera (*Asadbeyli and others/Azerbaijan*), § 34.

<sup>172</sup> EHRM 14 January 2010, appl.no. 23610/03 (*Melnikov/Russia*), § 74.

<sup>173</sup> EHRM 27 March 2014, appl.no. 58428/10 (*Matytsina/Russia*), § 153.

<sup>174</sup> EHRM 27 March 2014, appl.no. 58428/10 (*Matytsina/Russia*), § 157.

<sup>175</sup> The complex line of reasoning by the ECtHR will not be elaborated here.

<sup>176</sup> EHRM 10 May 2012, appl.no. 28328/03 (*Aigner/Austria*), § 39; EHRM 19 December 2013, appl.no. 26540/08 (*Rosin/Estonia*), § 55.

<sup>177</sup> EHRM 12 June 2014, appl.no. 30265/09 (*Dončev & Burgov/Macedonia*); EHRM 2 April 2013, appl.no. 25307/10 (dec.) (*D.T./Netherlands*); EHRM 3 April 2012, appl.no. 18475/05 (*Chmura/Poland*).

### 3.3 Position of the Witness

In Article 6 § 3, the rights of the defence are enshrined. In judging whether these rights are respected sufficiently, the ECtHR assesses the overall fairness of the procedure. In doing so, the ECtHR weighs in the balance ‘the competing interests of the defence, the victim, and witnesses, and the public interest in the effective administration of justice.’<sup>178</sup> This implies ‘that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.’<sup>179</sup> Courts may reject requests to have witnesses called, based on this approach. The well-being of a witness may provide a good reason for the absence of an opportunity to question a witness. At same time, the protective measures ‘must be reconciled with an adequate and effective exercise of the rights of the defence’.<sup>180</sup> Similar considerations can be found in the European Union Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA).<sup>181</sup>

It is the task of the contracting states to determine by what acts or omissions a witness becomes criminally liable. For example, the contracting states set the rules regarding exemption from testifying. If a witness refuses to answer without valid reason, the application of a means of coercion can be permissible. This depends on the circumstances of the case. In the case of *Van der Heijden v. the Netherlands* the ECtHR decided that holding a witness in custody for a period of 13 days, with the purpose of making her testify, was not a disproportionate infringement of her right to privacy. The ECtHR took into account that the procedure was accompanied by sufficient safeguards, including:

- a relatively short duration of validity of the detention order (24 hours) during which time the investigating judge is obliged to notify the Regional Court of the making of the detention order;
- a further short period of time (48 hours) within which the Regional Court must decide to release the witness or extend the detention order;
- the opportunity to apply to the Regional Court to order his release and the right to appeal against the refusal to grant such an application.<sup>182</sup>

If the witness is employed as a journalist, taking him in custody may violate his/her freedom of expression. In assessing this, the first relevant aspect is whether good reason exists for taking the witness in custody. If this is accepted,

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<sup>178</sup> ECtHR (GC) 15 December 2011, appl.nos. 26766/05 & 22228/06 (*Al-Khawaja & Tahery/United Kingdom*), § 119.

<sup>179</sup> EHRM 26 March 1996, appl.no. 20524/92 (*Doorson/Netherlands*), § 70.

<sup>180</sup> EHRM 2 July 2002, appl.no. 34209/96 (*S.N./Sweden*), § 47; Hoyano 2001; Keane 2012.

<sup>181</sup> See Associação Portuguesa de Apoio à Vítima 2009 about the implementation of this Framework Decision

<sup>182</sup> EHRM (GC) 3 April 2012, appl.no. 42857/05 (*Van der Heijden/Netherlands*), § 77.



the duration of the custody is an important factor. The ECtHR decided that the custody of a journalist for a period of 30 days was disproportionate.<sup>183</sup>

If a witness is forced to make a statement in a way that amounts to torture (Article 3 ECHR), the admission of the statement as evidence will lead to the finding that the right to a fair trial has been violated.<sup>184</sup> It is conceivable that the ECtHR would come to the same conclusion if a witness was compelled to testify without being tortured. Such a decision would be consistent with the ECtHR's approach of the right not to incriminate oneself. This right 'presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused'.<sup>185</sup> The use of force to obtain a witness statement can infringe the fairness of the procedure as well.<sup>186</sup>

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<sup>183</sup> EHRM 22 November 2007, appl.no. 64752/01 (Voskuil/Netherlands).

<sup>184</sup> ECtHR 27 June 2007, appl.no. 36549/03 (Harutyunyan/Armenia).

<sup>185</sup> ECtHR 11 July 2006, appl.no. 54810/00 (Jalloh/Germany), § 100.

<sup>186</sup> In ECtHR 18 December 2008, appl.no. 30663/04 (Lutsenko/Ukraine), § 59-62 the ECtHR assessed the situation in which a witness made a statement under pressure against the background of case-law concerning the right not to incriminate oneself.

## **4                      The Georgian Code of Criminal Procedure                              Compared to Dutch Criminal Procedure and                              ECtHR Case-Law**

### **4.1      Use of Witness Statements as Evidence**

The fundamental idea of the CCPG 2009, is that witness testimony is admissible only if the witness made a statement during trial. According to Articles 243 and 118 § 3 CCPG 2009, the reading out of pre-trial statements is permitted only under specific circumstances. Pre-trial statements made during an interrogation by the investigator may be read out at during trial, without the necessity of a witness interrogation during trial, but only if one of the specific circumstances of Article 243 CCPG occurs.

The ECtHR leaves it to the contracting states to determine the applicable rules on evidence, although it prefers evidence to be produced during trial. In the Netherlands pre-trial statements are often used as evidence. No special circumstances are required to justify the reading out of pre-trial statements.

### **4.2      Position of the Defence**

#### *4.2.1    Right to Equality of Arms*

According to Georgian transitional procedure, the investigator has the authority to interrogate witnesses before trial, without the defence being present and without the opportunity for the defence to put questions in writing. The investigator has the right to summon a witness. If a witness is summoned, he is compelled to answer questions and will be held criminally liable if he refuses to answer and if he makes a false statement. The defence does not have at its disposal similar ways of compelling a witness to testify.<sup>187</sup>

It is clear that this type of interrogation interferes with equality of arms. The question is whether the right to equality of arms, an aspect of the right to a fair trial, is violated by the application of this procedure. The answer to this question depends on the question whether the defence will have an opportunity to question the witness at a later stage of the proceedings. In some states

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<sup>187</sup> Bokhashvili 2012, p. 182.

witnesses are interviewed by investigating officers during the pre-trial investigation, without the defence present. In states like the Netherlands, the statements made by the witness are, as a rule, admissible as evidence. This practice does in itself not violate Article 6 ECHR. The ECtHR assesses the criminal procedure as a whole. A violation of the right to equality of arms will, with respect to witness testimony, only be found if the defence was, at no stage of the proceedings, offered an opportunity to effectively question a witness, while the public prosecutor did have an opportunity to collect testimony from this witness. Moreover, the defence must have expressed a wish to question the witness or must at least have opposed to the use of the testimony as evidence.

The CCPG 2009 has introduced an interrogation before a magistrate judge, in which the both the defence and the public prosecutor are able to participate. This type of interrogation is limited to specific situations, as is the admissibility of the testimony collected during the interrogation.

Dutch law is to a certain extent similar to the 1998 criminal procedure of Georgia. Witnesses can be interviewed by investigating (police) officers. Their statements are admissible as evidence. This may, however, be different if the defence has requested an opportunity of questioning the witness. Then, the right to examine witnesses will have to be respected. Exercising the right to examine witnesses, either during the investigation or during trial, will lead to the realization of equality of arms. An important difference with Georgian procedure is that witnesses are not compelled to appear and make a statement. The procedure is completely voluntary.

#### *4.2.2 Right to Examine Witnesses*

According to ECtHR case-law, the defence must have an opportunity to test the reliability of a witness statement, preferably during trial, but at least at some stage of the proceedings. If such an opportunity is not afforded, this must be justified with good reason. According to the CCPG 2009, witnesses must as a rule testify in court, with the opportunity of cross-examination by the defence. Article 243 CCPG 2009 prescribes that the reading out of pre-trial testimony is only allowed in specific situations. These situations will be accepted by the ECtHR as good reasons. Even if good reason exists, the conviction may not be based solely or to a decisive degree of the untested witness statement, unless sufficient counterbalance is provided. At present it appears to be allowed to convict solely or to a decisive degree on a pre-trial statement made by a witness during an interrogation by an investigator, to which the defence is not allowed to attend. According to the ECtHR's case-law, a report by an expert regarding the reliability

of a witness statement, has a counterbalancing effect.<sup>188</sup> However, Article 51 § 3 CCPG 2009 does not allow the assessment of the reliability of a witness statement by an expert.

If interrogation before a magistrate judge would become possible, the defence would have the right to participate in the interrogation. In specific circumstances, a witness could be interrogated in the absence of the defence.<sup>189</sup> Article 118 § 3 CCPG 2009 determines that pre-trial testimony obtained during an interrogation before a magistrate judge may in certain circumstances not provide the *sole* basis for a conviction. This provision does not exclude that a conviction would be based *to a decisive degree* on the statement by a witness who could not be examined by the defence.

It can be concluded that both under the rules in force at present and under the rules of the CCPG 2009 that have not yet entered into force, the admissibility of pre-trial testimony as evidence may constitute a violation of Article 6 § 3 (d) ECHR.

Dutch criminal law has incorporated the ECtHR approach regarding the right to examine witnesses in the case-law of the Supreme Court. Although witnesses are normally not summoned to appear at trial, the opportunity to question them is considered important. The lack of such an opportunity can lead to the acquittal of a defendant.

### 4.3 Position of the Witness

#### *Prohibition of withdrawing previous testimony*

A witness who made an incriminating statement is compelled to stick to his statement, because he will make himself criminally liable for ‘impediment of the administration of justice’ if he changes or withdraws his statement (Art. 371 CCG). This provision is problematic for several reasons. First, the finding of the truth is not promoted by criminalizing the adjustment of a witness statement. Under the CCPG 1998 a witness can be summoned, is compelled to appear, is put under oath and compelled to make a statement during the pre-trial interrogation.<sup>190</sup> Witnesses can have various reasons for making untruthful statements during pre-trial interrogation. For example, they may have reported a criminal offence falsely out a revenge, they may be put under pressure by the defendant or by people surrounding him and also the state officials carrying out an interrogation may more or less coerce a witness to make a statement. If a witness decides to tell the truth during trial, thereby discharging the defendant,

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<sup>188</sup> EHRM 2 April 2013, appl.no. 25307/10 (D.T./Netherlands).

<sup>189</sup> Article 114 § 4 CCPG 2009.

<sup>190</sup> This practice is not prohibited by the ECHR.

he cannot do so without making himself criminally liable. Consequently, this provision could prevent the truth being found. This may have as a consequence that innocent defendants are convicted.

A second objection is that Article 371 CCG virtually compels a witness to commit perjury if he does not want to make himself criminally liable for changing his initial statement. An investigator can put pressure on a witness in order to make him testify.<sup>191</sup> If the witness cannot withstand this pressure and makes a false statement incriminating the accused, Article 371 CCG can prevent the witness from making a truthful statement when being interrogated during trial. In this way s/he is practically forced to commit perjury (Art. 371 CCG). This means that s/he will make himself criminally liable no matter what position s/he chooses. The witness will have to commit a criminal offence to avoid criminal liability for a different offence. Remaining silent will be no alternative, as this has been criminalized too.

A third objection concerns the compatibility of Article 371 CCG with Article 6 ECHR. It can be argued that the application of Article 371 CCG can infringe the right to a fair trial. In the case of *Harutyunyan v. Armenia* the ECtHR found that two witnesses were tortured to make certain statements. These statements were subsequently used as evidence against the accused. The ECtHR held that the right to a fair trial was violated. This finding was based on the fact that testimony provided by the witnesses (and the accused himself) under pressure was used as evidence.<sup>192</sup> If a witness has made an incriminating statement to the investigator, Georgian criminal law compels him to confirm his statement when interrogated during trial. Admittedly, the sole risk of being prosecuted cannot be equaled to torture. However, the essence is not different: a statement a witness was forced to make, was used as evidence. If a witness is prosecuted for changing his initial statement, the right not to incriminate oneself can be violated if the statement made during trial is used as evidence. As mentioned before, the witness did not make a statement of his own free will, because he makes himself criminally liable, no matter what he would state at trial. Therefore, a relevant question is whether pre-trial witness interrogation should not have a more voluntary character.

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<sup>191</sup> From ECtHR 27 May 2010, appl.no. 18768/05 (*Saghinadze and others/Georgia*) it appears that this risk is real in Georgia too. In this case police officers were convicted for compelling a witness to make a false statement. Although Article 119 CCPG 1998 prohibits the use of coercion during witness interrogations, it cannot be guaranteed that a witness is never coerced to testify.

<sup>192</sup> ECtHR 27 June 2007, appl.no. 36549/03 (*Harutyunyan/Armenia*). See also ECtHR 8 April 2008, appl.no. 7170/02 (*Gradinar/Moldova*), in which the statements of several witnesses were according the Regional Court made under duress, while the appeal court did not explicitly assess the reliability of the statements. The ECtHR found a violation of Article 6 § 1 ECHR.

According to Dutch criminal law pre-trial witness interrogation is completely voluntary, except for specific situations of interrogation before an investigating judge, in which it can be expected that the witness will not appear during trial. The underlying principle is that witnesses must be able to withdraw or adjust their initial statements, if these were, originally, not made in accordance with the truth. This will improve the finding of truth, which is the primary aim of the criminal procedure.

#### *Indictment of persons initially interrogated as witnesses*

Under the CCPG 1998 investigators can summon persons to be interrogated as a witness and these persons are compelled to appear and to make a statement. According to Bokhashvili, it is common practice in Georgia to subsequently charge the same persons with a criminal offence and use the statements made as a witness during the interrogation as evidence.<sup>193</sup> It appears that investigators use their authority to force persons to make a statement as a witness to obtain statements from persons already suspected of having committed a criminal offence. The CCPG 2009 does not prohibit accused from being interrogated as a witness either. However, his pre-trial statements made as a witness are not admissible as evidence unless the accused consents to it.<sup>194</sup>

If a person was compelled to make a statement as a witness, the right not to incriminate oneself, enshrined in Article 6 ECHR, prohibits the use of this statement in a subsequent criminal procedure in which the witness is charged with a criminal offence.<sup>195</sup> Therefore, the practice under the CCPG 1998 to charge persons after they have provided witness testimony that incriminates themselves, is not in accordance with the right to a fair trial.

Dutch criminal law does not allow to use witness statements made under duress. Although suspects/accused can never be interrogated as a witness, it is possible that they are compelled to testify in administrative proceedings. This testimony is not admissible as evidence if they are subsequently charged with a criminal offence.

#### **4.4 Concluding remarks**

The rules regarding pre-trial interrogation of witnesses and the use of their testimony as evidence have dramatically changed under the CCPG 2009. Under

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<sup>193</sup> Bokhashvili 2012, p. 178: 'After providing statements as witnesses, investigators frequently declare them to be indicted persons, and all material that the person provided as a witness is then used against them.'

<sup>194</sup> Article 247 CCPG 2009.

<sup>195</sup> ECtHR 17 December 1996, appl.no. 19187/91 (Saunders/United Kingdom), § 70-76.

the CCPG 1998 an investigator can force a witness to make a statement without the presence of the defence. The statement made under interrogation can be used as evidence. The CCPG 2009 introduced the interrogation before a magistrate judge, as a rule in the presence of both parties. Witnesses can be interviewed by the public prosecutor, but this a voluntary procedure, while a witness statement obtained during an interview is not admissible as evidence. The rules regarding the interrogation of witnesses before a magistrate judge are not yet in force.

From the position of the defence, the rules of the new CCPG must be appreciated positively. The public prosecutor would no longer have the right to interrogate witnesses *in camera* without the defence being present. The interrogation before a magistrate judge would have an adversarial nature. At present, under the transitional proceedings, statements made during a pre-trial interrogation by a public prosecutor are admissible as evidence, provided that one of the special grounds for admitting pre-trial evidence, mentioned in Article 243 CCPG 2009, occurs. It is, therefore, possible to convict an accused based on testimony of a witness who could not be questioned by the defence. This may constitute a violation of Article 6 § 3(d) if the witness statement is of decisive importance.

The proceedings concerning pre-trial interrogation before a magistrate judge have not yet entered into force. The reason is that the Georgian prosecution service expects the new rules to have a negative impact on the opportunities of bringing a case to court. The question is whether this expectation is realistic. It is important to distinguish between two issues. The first issue is under what conditions pre-trial statements provide admissible evidence. There seems to be no discussion about this issue, as Article 243 CCPG 2009 has entered into force. This Article provides that pre-trial witness statements are admissible in exceptional circumstances only. As a general rule, witnesses must testify in court. The CCPG 1998 did not contain a similar provision. Witness statements made during an interrogation by the public prosecutor were admissible as evidence. The second issue is whether the procedure of interrogations before a magistrate judge in itself would result in less opportunities to effectively bring cases to court. The fear of the Georgian prosecution service is probably justified. If the prosecutor conducts a witness interview, the statement a witness makes, is not admissible as evidence. He could request for an interview before a magistrate judge, but this will be only allowed in special circumstances. If these circumstances do not occur, the prosecutor is dependent on the willingness of the witness to repeat the statement made during the interview in court. It is possible that s/he will not

repeat it, if s/he is currently deceased, cannot be located or refuses to repeat the statement.<sup>196</sup>

The rules of the CCPG 2009 share some aspects of the Dutch rules of procedure. In both legal systems witnesses can be pre-trial interviewed by investigators and before a judge. Interviews are voluntary. Interrogations before a judge are non-voluntary according to the CCPG and can be non-voluntary according to the CCPNL.<sup>197</sup> There are important differences. The first difference is that statements made by a witness during an interview by an investigator are admissible as evidence according to Dutch law, while they are not admissible according to Georgian law. The second difference is that, according to Dutch law, witnesses can be interrogated before an investigating judge without special circumstances being required. According to Georgian law a witness can only be interrogated before a magistrate judge if this is justified by special circumstances. These differences could be explained by a different view on criminal procedure. In many states, like the United Kingdom, pre-trial witness statements are only admissible as evidence under special circumstances. Witness statements must be made during trial, in order to enable the court/jury to form an own impression of the reliability of the witness and his statements and in order to enable the defence to exercise their rights in adversarial proceedings.<sup>198</sup> The Netherlands does this differently. The fact that pre-trial statements made during a police interrogation of a witness can be used as evidence in the Netherlands, probably also shows a certain trust in the way the police interrogates witnesses.

There are two main differences between the CCPG 1998 and the CCPG 2009 rules on pre-trial questioning of witnesses by an investigator. First, the 2009-procedure of *interviewing* witnesses is voluntary, while the witness is compelled to testify if he is *interrogated*. Second, the results of an interview by an investigator are not admissible as evidence, while the results of an interrogation may be admissible. The fear of the Georgian prosecution service could be reduced by accepting statements made during an interview as testimony that is admissible as evidence, provided that the requirements of Article 243 are fulfilled. The question is why compelled attendance and taking the oath should be required in order to consider a statement as testimony that can be used as evidence. Witness statements made under oath will not in every case be more reliable than statements made otherwise. If a witness would refuse to appear or to make a statement, the prosecutor could request for an

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<sup>196</sup> This would constitute a criminal offence. The witness may however risk being prosecuted himself, for example because he fear reprisal by the accused.

<sup>197</sup> Witnesses can be put under oath, for example if it is expected that they will not appear at trial, and can be forced to appear at the hearing. In most cases they are not put under oath and appear voluntary.

<sup>198</sup> Summers 2007, p. 141-155.



interrogation before a magistrate judge. It could be considered to make this possible in more situations than the CCPG 2009 mentions. A reason for this would be that the unavailability of a witness during trial often will only become known after the trial has commenced. For example, it is possible that a witness could be located during the pre-trial investigation but left the country for an unknown destination afterwards, while his disappearance could not be predicted.

If pre-trial statements would become accepted in more situations, it is important that sufficient safeguards are in place. It must for example be possible for the defence to examine important witnesses at some stage of the proceedings. The reliability of witness statements could be safeguarded by making audio-visual recordings of interviews by an investigator and by allowing a defence counsel during the interview.

In sum, a solution for the problems feared by the prosecution service, could be found in a limited adjustment of the rules on evidence. If the results of a witness interview would be accepted as evidence, provided that the requirements of Article 243 CCPG 2009 are fulfilled, the opportunities for an effective prosecution would increase, while the right of the defence would still be respected.

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